SUPREME COURT, U. S.

AUG 9 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-264

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, and Its LOCAL NO. 171,
Petitioners,

vs.

SAM KANE PACKING COMPANY, SAM KANE WHOLESALE MEAT, INC., and SAM KANE MEAT, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

The petitioners, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, and its Local No. 171, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 16, 1973.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit, — F.2d —, 83 LRRM 2298, is reprinted in Appendix B.

The Opinion of the United States District Court for the Southern District of Texas, — F.Supp. —, 83 LRRM 2294, is reprinted in Appendix C.

The Decision and Award of Arbitrator Bernal is reprinted in Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 16, 1973, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1

Is a union entitled to enforcement under §301 of the Labor-Management Relations Act of an award issued by a union-appointed arbitrator acting alone pursuant to a collective bargaining agreement which provided that if either party failed to participate "then the arbitrator so appointed by the other party shall promptly arbitrate and settle such grievance and his decision or decisions shall be final and binding upon the parties"?

2

In the light of the federal policy favoring labor arbitration, and the "final adjustment" of labor disputes "by a method agreed upon by the parties," 29 U.S.C. §173(d), did the Court of Appeals err in holding that the clause of the contract providing for default arbitration must be "construed strictly" and viewed as a "harsh penalty" which "has fallen out of the contract"?

STATUTORY PROVISIONS INVOLVED

We reproduce in Appendix A (A-1), *infra*: United States Code, Title 29, §185, which grants jurisdiction to federal district courts of "suits for violation of contracts between an employer and a labor organization"; and §173(d) which declares:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . ."

STATEMENT OF THE CASE

Respondent Kane (herein "employer") and Petitioners (herein "union") were parties to a collective bargaining agreement which provided a grievance procedure and for arbitration of unresolved grievances.

The agreement called for a three man arbitral body, each party to select one within specified short time limits, and those two to select a third.

Recognizing the need for expedition, and to assure prompt resolution of grievances, the agreement specifically provided:

> "If either the Company or the Union fails to appoint their respective arbitrator within said one (1) week period, then the arbitrator so appointed by the other party shall promptly arbitrate and settle such grievance or grievances, and his decision or decisions shall be final and binding upon the parties."

Forty-two employees filed grievances protesting their discharges. The employer claimed "slowdowns" and "in-

tentionally sloppy work" and "work stoppage" and "strike," while the employees claimed "lockout" and "discharge."

The union's attempt to utilize the contractual grievance and arbitration procedure was met by the employer's "statement that the matter was not subject to arbitration, that the workers would not be allowed to return [to work, since they] had been discharged and replaced."[1]

The union demanded arbitration, and designated as its arbitrator the Honorable Joe J. Bernal,[2] and "repeatedly notified the company to appoint an arbitrator so that a third could be chosen. The company consistently refused to agree that arbitration was required."[3] So Arbitrator Bernal noticed the matter for arbitration hearing at a specified time and place. The company, however, obtained an *ex parte* restraining order from the United States District Court preventing the arbitration.

The restraint was dissolved upon hearing of application for temporary injunction, for Norris-LaGuardia forbade injunction except in the narrow circumstance where petitioner was ready to proceed with arbitration at the time the injunction was sought. *Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970). And this employer was adamant that ". . . there is no arbitration whatsoever

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[1] Opinion of Court of Appeals, Slip Opinion, p. 3, Appendix B, p. A-5, *infra.*

[2] Mr. Bernal is a distinguished citizen of San Antonio; then a State Senator. The Court of Appeals is at pains to note his integrity, note 4, Slip Opinion, p. 19. Appendix B, *infra,* p. A-17.

[3] As found below, Slip Opinion, p. 5, Appendix B, *infra,* p. A-6. Actually, the employer's letter insisted "There is no pending arbitration. . . . You (Arbitrator Bernal) are not an arbitrator of any matter between the above named employer and the above named union for the reason that there is no matter being arbitrated or now subject to arbitration or now eligible for arbitration between them. . . ." Joint Appendix, Court of Appeals, p. 122.

pending, nor any matter currently eligible for arbitration between our client [employer] and yours [union]."[4]

The district court noted that the employer's counsel after redundantly stating that there was no arbitration, wrote:

> "If and when any matter for arbitration is properly brought, the company appoints the undersigned as its arbitrator. At the present time, there is no matter eligible for arbitration or before us for arbitration and I believe it silly to pretend otherwise";[5]

but the District Court properly concluded: "The assertions made by Alberts [employer's counsel] that, in a proper arbitration proceeding he is the arbitrator for the plaintiffs, stands for nothing."[6]

Upon the dissolution of the restraint, arbitrator Bernal again invited Alberts to participate, and advised the parties that the arbitration would be resumed at a specified time and place.

Again the employer refused to participate, and asserted there was "no pending arbitration." So "arbitrator Bernal conducted a full proceeding with those present . . . [and] about three weeks later issued a lengthy opinion finding that the company unfairly locked out the employees and ordering reinstatement with pay and benefits."[7]

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[4] Joint Appendix, Court of Appeals, p. 112—Alberts' letter of August 9. The Court of Appeals notes (Note 5, Slip Opinion, p. 20, Appendix B, *infra*, p. A-18), that the employer made no attempt to "enjoin the arbitration on the ground that it was 'one-sided'."

[5] *Ibid.*, p. 114. See Appendix C, *infra*, p. A-22.

[6] *Ibid.*, p. 54; Appendix C, *infra*, p. A-23.

[7] Cir. Ct. Opinion—Slip Opinion, pp. 5-6; Appendix B, p. A-7, *infra*.

When the employer refused to comply with the award the union sued to enforce it.[8] The District Court found the matter arbitrable under the contract, and held that "the assertions by Alberts that, in a proper arbitration proceeding, he is the arbitrator, stand for nothing." The District Court thus realistically viewed the situation as one where the union arbitrator was properly appointed, but the employer had failed to appoint its arbitrator.

Thus the District Court applied the default arbitration provision of the contract quoted above, and enforced the award. The employer appealed.

The Fifth Circuit held that the matter was arbitrable, but refused to enforce the award, holding that there could be no single party arbitration where the opposing party refuses to proceed.[9]

The Court of Appeals holds that ". . . the union should have sought an order from the district court compelling the company to follow the contractually agreed to procedures." For, in the view of the Court of Appeals the default arbitration proceeding was "to a degree . . . in con-

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[8] The employer's original suit to enjoin the arbitration was still pending, awaiting trial on the merits. The union filed a counterclaim in that pending suit. Federal jurisdiction arises under 29 U.S.C. § 185.

[9] The Circuit Court holds that the mere naming of a representative who refuses to act (either as "arbitrator," or as "employer attorney") removes the single party arbitration provision from the contract, viz.:

> "Once each side has named a representative we think the harsh penalty involved in allowing single party arbitration has fallen out of the contract." (Slip Opinion, p. 18; Appendix B, *infra*, p. A-16).

The Court of Appeals finds as fact that attorney Alberts "was designated employer representative *if any arbitration was going to take place* (emphasis added). Yet Mr. Alberts, speaking for himself as arbitrator, *and for the company* (emphasis added) consistently took the position that the dispute in this case was not arbitrable under the contract." Slip Opinion, p. 16; Appendix B, p. A-15, *infra*.

flict with the concept of true arbitration," represented a "harsh penalty" and "extreme sanction" the "over-extension [of which] could create more hostility in contravention of the aim of peaceful settlement of industrial disagreements."[10]

The Court of Appeals took no account of the true reason for the default arbitration procedure, i.e., to require *prompt* resolution of industrial disputes. To the contrary, it expressly held that rather than apply the cited provision, the union "should have requested the Court to order the employer to follow contract procedures and select an arbitrator."[11]

The court-suggested procedure is the antithesis of the contract procedure. To proceed as the court suggests would have meant that grievances arising in July 1971 would have been presented to an arbitrator either after May 18, 1972 (the date of the District Court's decision), or more likely, in the event of appeal, after May 16, 1973, the date of the Circuit Court's Opinion.

Witnesses disappear and memories dim in the time interval which the Court of Appeals requires before the arbitration can proceed. Both parties recognized as much, and so wrote the "default" procedure which the Court of Appeals has written out of the Agreement. Forty-two employees should not be required to live petrified in "discharge" status while the question of whether arbitration is available to them is bogged in overcrowded court docket.

Both employer and union at the time the contract was negotiated believed such delay intolerable.

Accordingly, they contracted for prompt arbitration. Quite apart from the individual hardship visited upon the

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[10] Slip Opinion, pp. 18-19; Appendix B, pp. A-16–A-18, *infra*.

[11] Note 5, Slip Opinion, p. 20; Appendix B, p. A-18, *infra*.

workers who must find food, shelter, and a living in the interim required to decide their case, the parties knew that union grievances smoldering for a year, or two, or more, made for bad labor relations. Indeed, the employer knew that its grievances against improper employee or union conduct necessarily required immediate resolution. It was precisely to avoid the delays inherent in going to court that both employer and union agreed to the default "single-arbitrator" procedure.

So viewed the contract provision is not, as the Court of Appeals held, "in conflict with the concept of true arbitration." Rather it is in aid of the basic federal labor relations policy of prompt resolution of grievance disputes by a method agreed upon by the parties.

REASONS FOR GRANTING THE WRIT

1

An important federal policy is involved in the peaceful settlement of disputes through favored private arbitration procedures. The decision below runs counter to the federal policy of encouraging labor arbitration as a mechanism for the *expeditious* settlement of industrial disputes. "This basic purpose is obviously largely undercut if there is no immediate, effective remedy. . . ." *Boys Market v. Retail Clerks*, 398 U.S. 235, 249.

If, as this Court observed in *Boys Market*, arbitration is the central institution in the administration of collective bargaining contracts, procedural devices selected by the parties to expedite the arbitration process and written into the agreement should be favored, not viewed as having "fallen out of the contract."

The default arbitration mechanism is a remedial device that merely effectively enforces the obligation that management and labor each freely undertook when they negotiated the collective bargaining agreement. The decision below which refuses to implement that obligation runs counter to the direction this Court has taken since *Lincoln Mills*,[12] in the *Steelworker Trilogy*,[13] and *Lucas Flour*.[14]

2

It is important to the administration of the federal labor laws that prompt grievance arbitration proceed—and that the procedures for expedition written into collective bar-

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[12] *Textile Workers v. Lincoln Mills*, 353 U.S. 448.

[13] Steelworkers Trilogy: *Warrior & Gulf*, 363 U.S. 574; *American Mfg.*, 363 U.S. 564; and *Enterprise Wheel*, 363 U.S. 593.

[14] *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95.

gaining agreements be implemented—not frustrated. Although this Court's writings beginning with *Lincoln Mills* and the *Steelworker Trilogy* have pointed toward a federal policy of implementing labor arbitration, this Court has not decided the important question of federal law presented in this case. Increasingly, parties to collective bargaining agreements are devising contract procedures designed to attain *prompt* arbitration, viz.:

> "Since 1966, a marked uptrend has developed in the frequency of collectively bargained stipulations attaching time limits of five days or less to the initiation of rank-and-file grievances.
>
> . . .
>
> Unresolved grievances are committed to arbitration under 94 percent of current contracts—down slightly from 96 percent in 1966. Only 1 percent of current arbitration provisions require mutual agreement, with the remainder stating or implying that arbitration is to follow automatically after the grievance procedure has been exhausted and may be invoked by either party. Arbitration provisions appear in 95 percent of manufacturing contracts and in 94 percent of nonmanufacturing agreements."

Bureau of National Affairs, *Basic Contract Patterns: Grievances, Arbitration,* Labor Relations Yearbook—*1970* at 37, 38 (1971). Cf. U. S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. *1425-6,* Major Collective Bargaining Agreements—Arbitration Procedures at 27-38 (1966). And more recently, see *New Directions in Grievance Handling and Arbitration,* 95 Monthly Labor Review, No. 11, Nov. 1972, at 3-30, and particularly, Power, *Improving Arbitration, id.* at 15-22, where current problems of arbitration and delay are discussed.

Validation, and enforcement of agreements to expedite labor settlements are of general concern. The Voluntary

Labor Arbitration Rules of the American Arbitration Association—in constant use by hundreds of unions and employers provide for a form of default arbitration: Rule 27 of the Voluntary Rules states:

> "Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who after due notice, fails to be present or fails to obtain an adjournment. . . ."[15]

The mere existence and enforcibility of these and other default arbitration clauses[16] serve to prod the parties to expeditious arbitration. To obliterate—or to refuse to enforce them—or to require the dispute to remain unresolved pending obtaining a court order to arbitrate before such provisions may be utilized, is to frustrate and stultify the prophylactic process which the Congress and this Court have designed to minimize industrial disputes.

"Single-party" or "default" arbitration provisions are designed to require *prompt* hearing and decision of current labor relations problems. Workers cannot afford the luxury of the gestation period of August to May required for a District Court to reach, hear and determine that arbitration may proceed in accordance with their contract. A basic reason for labor arbitrations is that it is prompt. Witnesses' recollections are good; indeed, witnesses are still in the locality and available in days or weeks; they are not in the months or years involved if the union must "have sought an order from the district court compelling the company to follow the contractually agreed to procedures." Slip Opinion, p. 18, Appendix B, p. A-17, *infra*.

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[15] Cf. Bureau of National Affairs, *AAA's Expedited Arbitration Plan*, LABOR RELATIONS YEARBOOK—*1972*, at 39 (1973), and see *FMCS Report on Mediation, Arbitration in Fiscal 1971, id.* 266-268.

[16] Cf., Bureau of National Affairs, *Ex Parte Arbitration*, LABOR RELATIONS EXPEDITER 28 (1972) and cases cited therein; and U.S. Bureau of Labor Statistics, *Bull. No. 1425-6, supra*, at 27-51.

3

Federal court dockets are clogged. District Court cases under the Labor Management Relations Act rose from 1,475 in 1970 to 2,101 in 1971 to 2,454 in 1972. Private actions under this statute rose from 1,841 in 1971 to 2,123 in 1972.[17] Invalidation of contract procedures designed to obtain prompt arbitral determination—and requiring court sanction preliminary to arbitration merely adds to this congestion. On the other hand, to channel the dispute to prompt arbitration will usually result in prompt settlement of the dispute.

Wherefore, petitioners pray that certiorari be granted, and that upon review the Circuit Court be reversed and the default arbitration provisions be held valid.

Respectfully submitted

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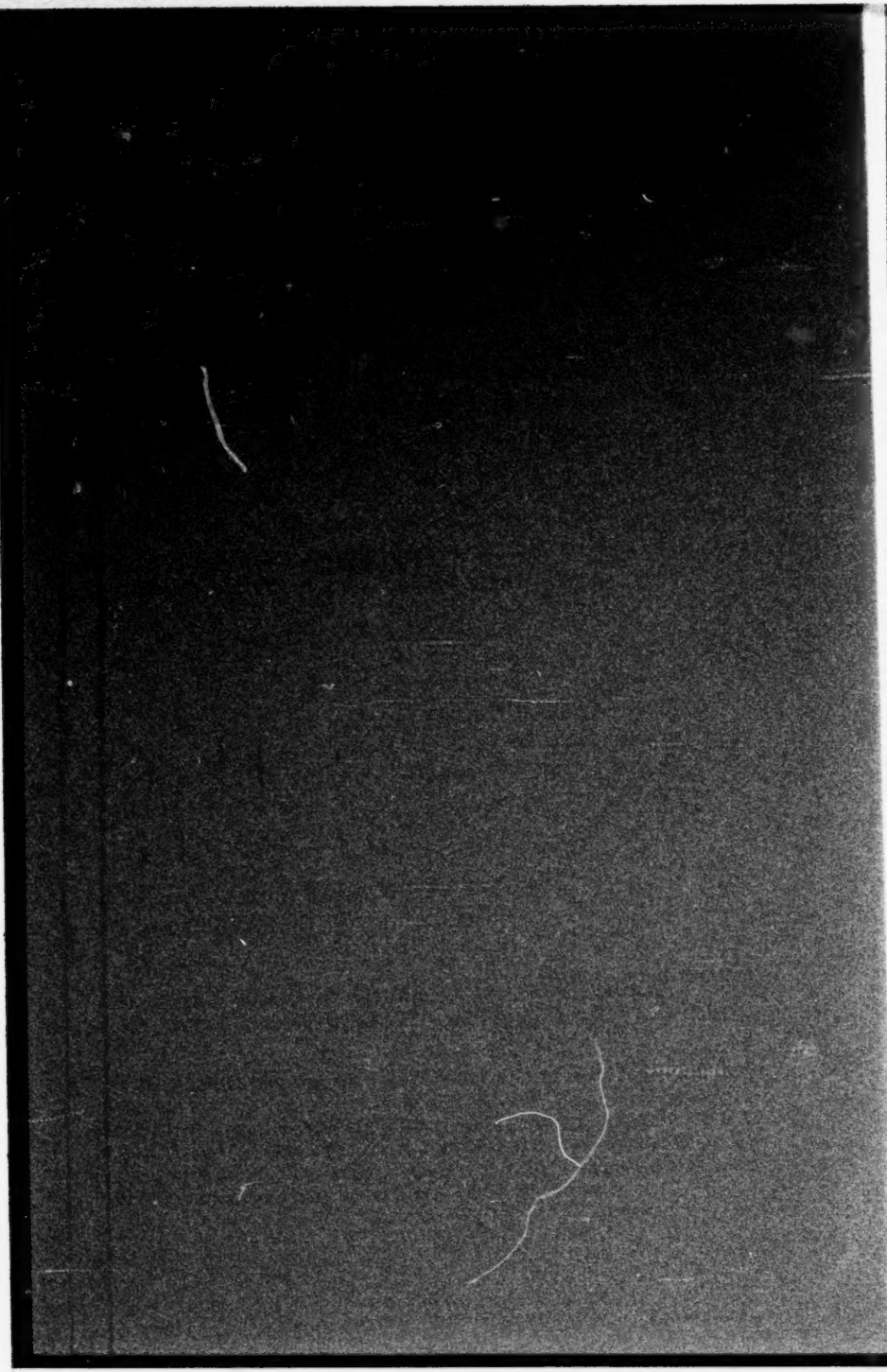
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[17] Annual Reports of the Director of the Administrative Office of the United States Courts, 1971, pp. 264, 269; 1972, pp. A-13, A-15.

These figures are not broken down to isolate § 301 actions from those brought either under Section 303 or Section 160 NLRB injunction actions. Accordingly, there are no precise figures for Sec. 301 actions. A spot check of recent Labor Advance Sheets indicates that by far the largest number of cases under LMRDA are brought under Sec. 301 to enforce labor contracts.



APPENDIX A

STATUTORY PROVISIONS

1. Labor Management Relations Act, 1947, § 203 (d); 29 USC § 173 (d):

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

2. Labor Management Relations Act, 1947, § 301; 29 USC § 185:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States

shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX B

In the
United States Court of Appeals
For the Fifth Circuit

No. 72-3026

Sam Kane Packing Co., Et Al.,
Plaintiffs-Appellants,

versus

Amalgamated Meat Cutters and Butcher
Workmen of North America, AFL-CIO,
and Its Local No. 171,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

(May 16, 1973)

Before Rives, Goldberg and Morgan,
Circuit Judges.

Morgan, Circuit Judge: This appeal raises the issue of whether or not a certain dispute between an employer and a labor union was subject to arbitration under the collective bargaining agreement between the parties. The district court for the Southern District of Texas on summary judg-

ment held that the dispute was indeed arbitrable and went on to enforce the unilateral arbitration award which had been issued by a single, union-appointed arbitrator. The company appeals both the finding of arbitrability and the enforcement of the award. After careful consideration, we affirm in part and remand in part.

I

Sam Kane Packing Company employed about 200 workers, with approximately 45 engaged in operations on the "kill floor". These workers were represented by appellee union, Amalgamated Meat Cutters and Butcher Workmen of North America and its Local No. 171.

The company alleges that it had been having difficulty with its kill floor employees over a fairly lengthy period of time. The company charges that these employees were engaged in slowdowns and intentionally sloppy work. The events giving rise to the current controversy between the union and the employer occurred on July 20, 1971. Apparently the company had called a meeting of kill floor employees to discuss the above mentioned problems. Following this meeting there occurred a disruption which resulted in no more work being done by these employees that day or thereafter. The exact nature and causes of this disruption are integral parts of the underlying dispute here. For our purposes it is sufficient to say that company officials called the police and had the employees removed from the premises. The company apparently takes the position that these employees engaged in a "work stoppage" or "strike" and that their removal and subsequent discharge was lawful under the contract. For its part, the union took the position immediately that the action by the company in removing these employees from the premises constituted a lockout in violation of the contract.

There was a period of correspondence, or at least attempted correspondence, between union and company

officials. By letter of July 31, 1971, the union notified the company that it planned to invoke the contractual grievance procedures to resolve this dispute, suggesting that the company agree to go directly to arbitration on the matter. At that time the union also ordered the employees to return to work. The employer countered with a statement that the matter was not subject to arbitration and that the workers would not be allowed to return and had been discharged and replaced.

Despite the company's opposition to arbitration, the union went ahead with arbitration procedures. Under the contract each party was to appoint a representative to the arbitration panel and the two representatives were to select a third by mutual agreement.[1] If either party failed to appoint a representative, the contract stated that the single representative appointed by the other party would have full power to issue a binding adjudication on the merits.

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[1] The contract reads as follows:

Section 8. Either party may request arbitration of an unsettled grievance after exhaustion of the grievance procedure hereinabove set out. The right of either party to request arbitration over an unadjusted grievance is limited to a period of ten (10) calendar days from the final action taken on such grievance under the last step in the grievance procedure above detailed.

One (1) representative shall be appointed by the Company and one (1) representative shall be appointed by the Union to act as arbitrators for each grievance. Such appointments must be made by the parties within one (1) week after the written request by either party to submit the grievance to arbitration.

If either the Company or the Union fails to appoint their respective arbitrator within said one (1) week period, then the arbitrator so appointed by the other party shall promptly arbitrate and settle such grievance or grievances, and his decision or decisions shall be final and binding upon the parties.

After such arbitrators are so appointed, the party or parties desiring arbitration shall promptly within two (2) days present in writing to the arbitrators so appointed the question and/or questions and the matter and/or matters to be arbi-

The union appointed its representative and repeatedly notified the company to appoint an arbitrator so that a third could be chosen. The company consistently refused to agree that arbitration was required. The union appointed State Senator Joe Bernal as its representative. The union informed the company that it had scheduled an arbitration hearing before Senator Bernal on August 23, 1971. The company, however, obtained an ex parte restraining order from the district court preventing that arbitration proceeding. After a hearing on August 28th, the court dissolved the restraining order, thus permitting the arbitration to proceed. The company was notified of the rescheduled arbitration set for August 30, but refused to participate in any way, taking the position that it could not be forced to arbitrate until a court had determined the issue of arbitrability as a final matter.

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trated. A copy of such questions and matters shall be delivered to the opposite party. Within one (1) week after such notification, the other party shall give in like manner similar written notice in defense of its position. It is understood that the party or parties initiating arbitration shall not introduce any additional question or matter which is not relevant to the matter to be arbitrated.

If the two (2) arbitrators are so selected and appointed as above provided, then the two (2) arbitrators shall select the third (3rd) arbitrator, who shall be impartial and disinterested and not in any way connected with either the Company or the aggrieved employee or employees or the Union. In the event that the two (2) arbitrators shall fail within five (5) calendar days to select a third (3rd) arbitrator, then upon request of either party, the Federal Mediation and Conciliation Service shall be requested to submit a list of five (5) arbitrators, each of whom shall be an impartial person qualified to act as an arbitrator. From this list the Union shall subtract two (2) names, then the Company shall subtract two (2) names, and the first person's name which remains on the list then shall be the arbitrator. The reasonable expense of the third (3rd) arbitrator together with any other arbitration costs shall be borne equally by the respective parties. The decision of a majority of the arbitration committee shall be final and binding upon the parties hereto.

It appears that the company did inform the union that while it took the position that there would be no arbitration in this case because it was not contractually agreed to, if there was to be any arbitration the company's representative would be Mr. Harold Alberts, the company attorney. Both the union attorney, Mr. Herrera, and the union representative, Senator Bernal, were clearly informed of this position in advance of the scheduled hearing date.

When the company did not appear to participate in the August 30th hearing, arbitrator Bernal conducted a full proceeding with those present. About three weeks later Senator Bernal issued a lengthy opinion finding that the company unfairly locked out the employees and ordering reinstatement with pay and benefits. Because of the company's refusal to participate, only union witnesses and counsel appeared before the arbitrator. The company then refused to comply with the award, taking the position that in the first instance it did not have to arbitrate at that time because a court had not decided as a final matter that it was bound to arbitrate under the contract. Secondly, the company maintained that it did not have to comply with Senator Bernal's award because contract procedures had not been followed and, under the facts of this situation, the contract did not allow the union representative to proceed on his own.

II

This case must be resolved by construction of certain clauses in the collective bargaining agreement in force between these parties. Of course, these clauses cannot be evaluated out of context or unmindful of the contract and industrial setting as a whole. However, unless there is patent ambiguity, the plain meaning of the words should generally be followed.

At the heart of the dispute is the interpretation of Article V entitled, "Grievance and Arbitration":

Section 1. For the purposes of this agreement, the term "grievance" means a written dispute, claim or complaint arising under and during the term of this labor contract between the Company and the Union or between the Company and any employee or employees in the bargaining unit concerning the effect, interpretation, application, claim of breach or violation of an expressed provision or provisions of this contract. Such matters shall be processed through the grievance procedure without resort to a strike or a lock-out, and if either party hereto resorts to any action violative of Article IV (No Strike, Slow-Down, Work Stoppage) of this agreement, the grievance and arbitration provisions of this article shall be null and void and of no effect and either party hereto shall have the immediate right to seek redress from the appropriate court without the necessity of exhausting the grievance and/or arbitration procedures hereunder.

Article IV, referred to in the above passage, reads in pertinent part:

ARTICLE IV—NO STRIKE, SLOW-DOWN, WORK STOPPAGE

Section 1. During the term of this agreement, the Company agrees that it will not lock-out the employees covered by this agreement.

Section 2. During the term of this agreement, the Union agrees that it will not sanction, call, acquiesce or engage in or cause any strike, sit-down, slow-down, picketing, sympathy strike or other work stoppage against the Company for any reason. The Union agrees also that it will not for any reason during the term of this agreement sanction, call, acquiesce or engage in any curtailment, restriction or interference with the work of the Company or of any of its agents, servants or employees, or advise that such action be taken. Any

employee covered by the terms of this agreement participating in any action prohibited by this section may be disciplined by the Company either by discharge or lesser penalty.

• • • • • • • •

Section 5. The Company shall have the right to discipline up to and including discharge any employee who instigates, participates in or gives leadership to any activity prohibited by this Article. *If the Company discipline in this regard is challenged through the grievance procedure and the same proceeds to arbitration, the arbitrator shall have the power to review the reasonableness of the penalties imposed, but they may order back pay only upon a finding of innocence.* (Emphasis supplied).

These contract provisions are the only ones which have a direct bearing on the issue of arbitrability in this case. It now becomes encumbent on this court to evaluate their meaning as they apply to this situation.

III

In its opinion, the district court held that the dispute in this case was arbitrable despite the employer's objections that the exclusionary language in Article V withdrew the issue from arbitration since it involved a charge of lockout (and for that matter, a cross-charge of a strike). The district court disagreed with the employer, holding that the cross reference in Article IV was modified by the parenthetical material which alluded only to strikes, slow-downs and work stoppages. The court construed the cross reference to apply only to Section 2 of Article IV and not to Section 1, the lock-out section. We agree with both the union and employer that this is a rather strange and unnatural construction of this contract. The union is apparently ready to agree that whatever the exclusionary clause

means, it does not leave out lock-outs and, if it otherwise applied to this situation, the construction given it by the district court is clearly erroneous. Therefore, we turn to other possible constructions of this contract.

At the outset, the court feels that one of the problems which has created so much difficulty for these parties is the terminology used. The company throughout has taken the position that it was acting lawfully under the contract because it was disciplining these workers either for the alleged slow-downs which occurred prior to July 20, 1971, and/or for the alleged refusal to return to work after the coffee break and speech on July 20th. The union, in its earliest letters, took the position that the "removal" on July 20 was a lockout in violation of the contract. The court feels that use of the term "lockout" has created much of the confusion in this case. It seems clear to the court that the company considered these employees discharged soon after the events of July 20th. When the union while seeking arbitration, ordered its employees back to work, the company replied that they were no longer employed and had been replaced. Thus, we feel the real dispute between the union and the company here is not over direct damages dependent upon whether this was a strike or a lockout. We feel certain that the exclusion to the grievance machinery found in Article V, whatever it may mean, was not intended to prevent arbitration of the real issues in this case.

Those real issues as we see it are whether or not the company was justified in refusing to allow these individuals to return to their jobs and whether or not it was justified in having them removed from the premises by the police for violating the contract. In short, what the union was seeking, as shown here by the final award given by the union's representative as sole arbitrator, was a determination of whether or not the company had any justification in the sanctions it took against these employees, be it the

sanction of having them removed by the police or the ultimate sanction of discharge.

We find that the parties had unquestionably agreed to arbitrate that issue by the express provisions of Article IV, Section 5. The company alleges that it was simply disciplining its employees for violation of the prohibitive sections of Article IV. That was the only alleged justification for all of its actions. It does not seem to matter by what term the union seeks to call the company's acts. We think the company has seized on the fact that the union referred to the company's subsequent action as a "lockout" in an attempt to avoid arbitrating its dismissal of these employees. The only relief that the union sought before the arbitrator in the proceedings held was reinstatement and back pay for the employees on the kill floor from the time that they were removed by police on instructions of the company. Any mass removal of employees or firing by the company during an alleged work stoppage could be characterized as a "lockout" in order to avoid arbitration. Yet the more specific section, Section 5 of Article IV, which lacks any of the ambiguities of Article V, seems so clearly to contemplate arbitration of such discipline that this court can reach no conclusion other than the fact that the parties had agreed to arbitrate this issue.

We note that this analysis of the contract structure and facts in this case is extremely similar to that which this court enunciated in *United Steel Workers v. American International Aluminum Corporation,* 5 Cir. 1964, 334 F.2d 147. In that case the court stated:

> We can assume that the employer is correct that neither the Employer nor Union has any right to demand arbitration of a controversy concerning whether there has been a strike, picketing, stoppage, slowdown, sit-down, stayin, or other curtailment or interference with work on the part of the employees or a

> lockout on the part of the Employer. ***But if a discharge resulted from either strike or work stoppage on the Union's part or a lockout by the Employer, the contract plainly recognized that this dispute was open for arbitration.*** And certainly, whatever arguments might be mustered for a contrary result, the purpose to exclude a grievance over discharge flowing from a work stoppage is not so clear as to permit a court, under the guise of contract construction, to invade that territory now reserved to the arbitrator. (Emphasis supplied and citations omitted). Id. at 151.

Here discipline resulted from this occurrence whether or not it is characterized as a lockout or a strike. These employees have simply not been allowed to work for this company as union employees in their old jobs. That is discipline. That is within the express arbitration clause found in Section 5 of Article IV.

In seeking to avoid this analysis, the employer argues that *American International Aluminum* is not applicable to this case because the court there assumed that the employer was right in his contention that the underlying issue of a strike or lockout could be arbitrated. As pointed out, there is no question that discipline resulted from either the strike or lockout, however it is characterized. All that *American Aluminum* requires is that the contract envisions arbitration for any discipline which result from a strike or lockout. The contract in this case unquestionably envisions such arbitration.

As the court in *American International Aluminum* pointed out, the primary reason that contracting parties often except arbitration of strikes and lockouts from the grievance and arbitration proceedings is that this would eliminate in such instances the very difficult question in a suit by the employer against the union, or the union against the employer, for damages resulting from an unauthorized strike or lockout as to whether the controversy

had to first be submitted to arbitration rather than going directly into court. Id. at 151, n. 7.

While we do not find it necessary to construe the language in Article V in the exception clause because of the more specific language found in Article IV, Section 5, we note that the difficult problem of suits for damages being subject to prior arbitration is probably the very reason that the exclusionary clause was included in that article. In all probability the language inserted was to make unquestionably sure that neither the employer or union would be able to use as a defense to a suit for damages for contract breach the claim that the issue had to first go to arbitration and damages be determined by arbitration. This is far and away the most rational construction of that section and avoids the difficulties in any other construction which both sides have recognized throughout this proceeding. Any construction of Article V which does not find the purpose to be that set forth above or find that which in effect Article V does it give an option to the aggrieved party to go to arbitration or seek court relief would be highly strained in light of the general nature of collective bargaining relationships and would undoubtedly cause great concern to the parties.

We, therefore, find that this was indeed an arbitrable dispute under the contract and that the real issue involved here, no matter how it was phrased, was what punishment, if any, could be inflicted on these employees. As noted, this was not the case when the union was seeking some sort of damages over and above reinstatement for an illegal lockout. Nor was it a case, such as would come up in a strike, where the employer was seeking damages to his business from an illegal work stoppage by the union. Rather, it was simply a case of evaluating whether there was just grounds for discipline, and whether the discipline was properly meted out. The contract expressly envisions arbitration of such an issue. There is no ambiguity.

There is, as previously noted, a very strong presumption favoring arbitration of labor disputes where the contract is capable of such a construction. As this court pointed out in *Communications Workers v. S. W. Bell,* 5 Cir. 1971, 415 F.2d 35, 39:

> Interpretation of contract language restricting the scope of arbitration is governed by the rigid standards established in the Steelworkers' cases. These require that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail * * *," United Steelworkers of America v. Warrior and Gulf Navigation Company, supra, 363 U.S. at 585, 80 S.Ct. at 1354, and that an order prohibiting arbitration cannot be issued "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers of America v. Warrior and Gulf Navigation Company, supra, 363 U.S. at 582-583, 80 S.Ct., at 1353. As summarized by the Second Circuit Court of Appeals in Proctor & Gamble Manufacturing Company, 298 F.2d 644, 645-646.
>
> > "The nub of the matter is that under the broad and comprehensive standard labor arbitration clause every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement. * * *"

As our opinion has demonstrated, it seems clear from this contract that arbitration of this dispute was contemplated.

IV

The question remains in this case as to what effect, if any, should be given the arbitration award handed down by Senator Bernal, the appointed union representative to what allegedly should have been a tripartite arbitration board. The district court, having found the issue arbitrable, enforced the order of the union appointed arbitrator without any substantive discussion whatsoever in his opinion. We find it necessary, however, to turn to the arbitration procedures section of the contract to determine whether or not the arbitration proceedings were valid.[2]

The contract provides that the union and the company shall each appoint one representative to act as arbitrators. Upon the failure of one party or the other to appoint an arbitrator to represent its side, the arbitrator appointed by the single party shall promptly arbitrate and settle the grievance, with his decision binding on the parties. Our question here concerns whether or not this precise contract provision applies to this factual situation.

It is clear that Mr. Harold Alberts, attorney for the company, was designated the company representative prior to arbitration. More precisely, he was designated their representative if any arbitration was going to take place. Yet Mr. Alberts, speaking for himself as arbitrator, and for the company, consistently took the position that the dispute in this case was not arbitrable under the contract. Thus, we have the situation where it appears that one of the appointed arbitrators took the position that the dispute was arbitrable, while the other did not. Even though courts decide in the first instance on arbitrability, because of the extreme presumption in favor of allowing arbitration, the arbitrator is permitted to determine whether or not, under the contract, the dispute is arbitrable. Thus, at this point

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[2] The complete section on arbitration procedures is set out in footnote 1, supra.

in time we had two arbitrators in disagreement over this threshold issue.

Of course, in this situation the preferable procedure would have been for these two men to follow the envisioned contract procedures and select a third man who would then, in fact, be the real arbitrator of this case. Apparently the company felt that even to take this step would put them in a delicate position as far as their court suit was concerned. The company probably reasoned if a neutral arbitrator was appointed and found the matter arbitrable that their court suit on arbitrability for all intents and purposes would be worthless. They would then be bound by whatever the arbitrator decided. When the company did not give further response to the union's request for the selection of a third arbitrator, the union representative then went on to decide the issue.

The company maintains that it could not be forced to arbitrate this matter until it had been conclusively decided by a court that the matter was arbitrable. This position becomes even more complicated where the employer had tried unsuccessfully to enjoin the arbitration. We note that there was no counterclaim by the union in that suit in an attempt to force the employer to follow the contract procedures. We think under the situation presented by this case that that would have been the far preferable approach. However, since that was not done, we must dig more deeply into this matter to resolve the issue. The result must turn on whether or not this contract can be construed to allow single party arbitration where one party appoints a representative as called for by the contract but that representative refuses to proceed with the selection of a neutral.

Once each side has named a representative we think the harsh penalty involved in allowing single party arbitration has fallen out of the contract. That is an extreme sanction and over-extension could create more hos-

tility in contravention of the aim of peaceful settlement of industrial disagreements through contractual arbitration. Therefore, we hold that this one clause of the contract will be construed strictly to apply only where no representative whatsoever is named to the board. The question then is what was the union to do faced with the company's adamant refusal to cooperate.

The simple answer here is that the union should have sought an order from the district court compelling the company to follow the contractually agreed to procedures. There is simply no support in the contract for the proposition that the employer had agreed to let the union representative alone decide the substantive issue. Since there was a readily available alternative (a counterclaim for compulsion to arbitration) available to the union, we do not approve the unilateral arbitration which does not fall squarely within the contract clause.

We note that had there been a method whereby an admittedly "neutral" arbitrator was selected and the company merely refused to participate in the hearing we would be faced with a strong case for the award.[3] See *Meatcutters v. Penobscot Poultry,* 200 F.Supp. 879; *Boot & Shoe Workers v. Faith Shoe Co.,* 201 F.Supp. 234; cf. *Teamsters v. Braswell,* 5 Cir. 1968, 392 F.2d 1. Here, however, the arbitrator who issued the award cannot be denominated a "neutral"[4] as the parties would con-

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[3] Here there seems a strong argument that under the contract the union could have received a list of "neutrals" from the FMCS and, if the company refused to strike any names, pick any one of the five. We feel that selection by such a procedure would be a valid response to the employers recalcitrance and that the award of one so chosen would be enforceable.

[4] We mean to cast no unfair light on this arbitrator's integrity by describing him as the "union representative" or not as a "neutral". We are not basing our refusal to enforce his award because of any feeling of correctness, incorrectness or prejudice on his behalf. Rather, we are refusing to enforce the award simply because there is no basis in the contract for allowing this individual to arbitrate this case on these facts.

template the term. Thus, there was no jurisdiction under the contract for this arbitration by a single union designated representative and the award will not be enforced. The contract in question here generally contemplates arbitration by a "neutral" chosen by both parties and provides a method of selection for that purpose. There is one clear exception to the above whenever one party fails to name a representative. As noted, because of the harshness of that sanction and the fact that it, to a degree, is in conflict with the concept of true arbitration, we will construe its provisions strictly. Finding no contractual grounds giving the union representative acting alone the right to issue a binding award, we refuse to enforce that award.

While we feel the district court was correct in finding that the parties had agreed to arbitrate this matter, we are unwilling to say that the method of arbitration followed herein was valid. Thus, the only arbitration which should have been compelled or allowed was one in line with the provisions of the contract.[5]

In conclusion, we find that the underlying dispute in this case is arbitrable under the agreement and direct that the district court order these parties to each select a representative and go about the selection of a "neutral" third member[6] as soon as possible.

AFFIRMED in part and REMANDED in part with directions.

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[5] We feel part of the legal confusion in this case results from the attempt to enjoin. Apparently only one objection to arbitration—lack of an arbitrable dispute—was raised before the district court. We feel the company should have also sought prohibition of the one-sided arbitration being advanced by the union. The union, for its part, should have requested the court to order the employer to follow contract procedures and select an arbitrator.

[6] We note that several issues raised by the parties before the district court on issues of procedure and the like are to be decided by the arbitrators not the court.

APPENDIX C

In the District Court of the United States
For the Southern District of Texas
Corpus Christi Division

Sam Kane Packing Co., Sam Kane Wholesale Meat, Inc., and Same Kane Meat, Inc. v. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and Its Local No. 171, et al.	C.A. No. 71-C-148

MEMORANDUM

(Filed May 19, 1972)

The Plaintiffs, Sam Kane Packing Co., Sam Kane Wholesale Meat, Inc., and Sam Kane Meat, Inc., being equally involved without distinction, will hereafter sometimes be referred to as Kane Packing. The Defendants, hereafter sometimes called Meat Cutters' Union, represent employees on the kill-floor of Plaintiffs.

Kane Packing contends that sometime prior to July, 1971, the employees working on the kill-floor took effective control of those operations away from the management of Kane Packing by allegedly engaging in work stoppages, work slow-downs, extensive breakage of equipment, insubordination to supervisors, unreasonable percentages of absences and unreasonable percentages of tardiness, general rowdyism and general defiance of the management.

Mr. Harold Alberts, attorney for Plaintiffs, by letter dated July 16, 1971, notified the officials of the Meat Cutters' Union concerning this claimed harassment, and explained if it continued, the kill-floor might have to be closed. Then, on the morning of July 20, 1971, at a meeting with the kill-floor employees, Alberts, at the request of Sam Kane, president of each of the Plaintiff companies, explained to the employees that unless such harassment was discontinued, it would be necessary for the Plaintiffs to close the kill-floor. No representative of Defendants was present at the meeting.

This meeting went on from about eight o'clock until nine-thirty that morning, when the kill-floor employees took their coffee break. They customarily returned to their jobs at 9:45 a.m., but, in this instance, a majority did not do so. Instead, they remained on Plaintiffs' grounds in the rear of the plant building. There was some testimony that most of the employees were Mexican-Americans with limited knowledge of the English language and confusion resulted from a misunderstanding as to what was intended by the explanation.

The next group of employees took their coffee break at ten o'clock. At this time, a number of the kill-floor employees were still on the plant grounds. When the coffee break for this second group was over, some of these employees also refused to return to work, although most of them did so. There was still a large number of employees on the grounds at 11:15 a.m. Plaintiffs called on the police department to clear the grounds. When the police officers arrived, a few more employees returned to work and the rest left the premises. Those who did not return to work, from Plaintiffs' standpoint, were no longer their employees. They had voluntarily quit working for Sam Kane Packing.

The evidence showed that subsequent to this occurrence, a campaign of terror and violence began and lasted until the 27th day of August, 1971, at which time this harass-

ment ceased. Some of these employees had been found guilty or pled guilty to crimes of violence in connection with such harassment.

The Meat Cutters' Union contends that this controversy started on July 20, 1971, when the employer, Kane Packing, discharged a large number of employees and they were not allowed to come back to work. The Meat Cutters called this a "lock-out," and, by letter of July 21, to Kane Packing, sought a reinstatement of all the employees.

Upon receipt of such letter, Mr. Alberts, continuing to represent the Plaintiffs, made a diligent effort, by telephone calls and letters, to talk to Mr. Rendon, the representative of the union, but it was a week before Alberts' endeavor was productive. On July 27th, Alberts wrote Rendon, referring to certain information he furnished to Rendon, and expressing surprise that Rendon would deny knowledge of the violence which had occurred. Without detailing all that had gone on during this period, it appears to the Court that the union officials, up to this point, were lacking candor in their dealings with Plaintiffs.

By letter dated July 31, 1971, Local Union No. 171, Amalgamated Meat Cutters and Butcher Workmen of North America, advised Kane Packing that the refusal to reinstate to their former jobs those employees who failed to return to work constituted a lock-out in violation of the collective bargaining contract, particularly Article IV, Section 1, thereof. This letter constituted a "formal invocation of the grievance and arbitration procedures." Kane Packing was further advised that instructions had been given to "all your employees to report for work at their regular starting time on Wednesday morning, August 4, 1971." In a reply letter dated August 2, 1971, Alberts alleged that the formal invocation of the grievance and arbitration procedures was "tardily written and tardily received under the express provisions of the contract."

The Amalgamated Meat Cutters and Butcher Workmen of North America, Local 171, by letter of August 6, 1971, advised Mr. Joe Bernal that he had been appointed "to act as an arbitrator with regard to" this matter. A copy of this letter was sent to Mr. Alberts.

Also by a letter of August 6 directed to the attorney for Plaintiffs, Mr. Herrera, the attorney for the Meat Cutters' Union, advised that the issues to be submitted for arbitration were as follows:

> "(1) Whether the company on July 20, 1971, locked out its employees in contravention of the provisions of Article IV;
>
> "(2) If so, whether the proper remedy is reinstatement of said employees to their former or substantially equivalent jobs, with back wages."

By letter dated August 9, 1971, addressed to Herrera, Alberts denied that any arbitration proceedings were pending, citing several reasons, including that Section 1 of Article V of said Collective Bargaining Agreement, which defines grievance as a "written dispute," had not been complied with; that the walk-out by the employees on July 20, 1971, negatived the right to proceed with grievance procedures, which are to be processed without "resort to strike or lock-out"; and, further that the Meat Cutters' Union had violated Section 2 of Article IV of said agreement by the slow-down and work stoppage, and, thus, under Section 1 of Article V, the arbitration and grievance provisions are null and void.

By letter dated August 18, 1971, Alberts was advised that an arbitration proceeding was set for August 23, 1971, to which, by letter dated August 20, 1971, Alberts restated the position Sam Kane Packing had taken all along. No arbitrator was appointed by Plaintiffs, but, contrariwise, they sought relief from this Court. Plaintiffs' request for

a preliminary injunction to stop the arbitration proceedings was denied. Mr. Bernal conducted the proceeding alone and made his findings alone. The award made solely by Mr. Bernal was dated the 21st day of September, 1971. The assertions by Alberts that, in a proper arbitration proceeding, he is the arbitrator for Plaintiffs, stand for nothing.

The Defendant Meat Cutters' Union has filed herein its motion for summary judgment, as has Plaintiff Kane Packing. The Court heard testimony on Plaintiffs' application for injunctive relief, and it has reviewed both motions and the affidavits and other exhibits in support thereof. There appear to be certain controverted facts as to what happened initially, that is, were the kill-floor employees engaged in the activities complained about in Albert's letter of July 16, 1971, and did they walk off the job and quit, or were they locked out. If these facts are material to the right of recovery by either party, neither motion should be granted. If not, then the Court's decision must be based upon what it considers to be the proper application of the law to the terms of the Collective Bargaining Agreement.

Under Article V, Section 1, of said Agreement, it is provided that:

> "'Grievance' means a *written* dispute, claim or complaint *arising* • • • *between the company and any* • • • *employees,* • • • concerning the effect, interpretation, application, *claim of breach or violation of an express provision or provisions of this contract.*" (Emphasis added.)

The letter of July 21, 1971, from Local Union No. 171 to Mr. Alberts, contending that Sam Kane Packing ". . . has lockout it's employees. This is contrary to the terms of our existing Collective Bargaining Agreement . . .," constitutes a written claim or complaint concerning a claim

of breach for a violation of an express provision or provisions of the contract. Plaintiffs agreed, in Section 1 of Article IV, not to "lock out the employees covered by this agreement." Since Plaintiffs deny this charge, contending the employees voluntarily quit their jobs, there is certainly a dispute, and a "grievance" exists under the above quoted portion of such Section 1.

Plaintiffs objected, as has been already mentioned, to the formal instituting of arbitration procedures as "tardily written and tardily received." Such objection is not for the Court to resolve. That matter is reserved for the arbitrators. *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543; *United Steel Workers of America v. American International Aluminum Corp.,* 334 F.2d 147 (5 Cir., 1964); *Galveston Maritime Ass'n. v. South Atlantic & Gulf Coast District,* 234 F.Supp. 250 (S.D. Tex., 1964).

Next, we must deal with the principal problem here of whether or not this grievance is arbitrable. The much referred to steelworkers' trilogy[1] and the Fifth Circuit's explanation of these cases, in *Local Union No. 787, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. Collins Radio Company,* 317 F.2d 214 (1963), and *Communications Workers of America v. Southwestern Bell Telephone Company,* 415 F.2d 35 (5 Cir., 1969), tells us that the Court's function regarding grievance procedures and determination of issues involved in disputes, claims and complaints is severely limited. But, if a dispute concerns a matter expressly and clearly without the sphere of grievance and arbitration procedures, then the Court should take jurisdiction, and say so.

But, if no clearly expressed exclusion exists, the matter is to be processed under the grievance provisions of the

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[1] United Steel Workers of America v. American Mfg. Co., 363 U.S. 564 (1960); v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

contract, even as to the "effect, interpretation, application, claim of breach or violation of an express provision or provisions of this contract," and, if not otherwise concluded, by arbitration. And, under such circumstances, neither party can frustrate arbitration by staying away. *Teamsters Local Unions v. Braswell Motor Freight Lines,* 392 F.2d 1, 9 (5 Cir., 1968).

Whether or not the grievance submitted by the Meat Cutters' Union, to wit, a lock-out, is an arbitrable one depends on what Article V, Section 1, means. After having set forth the meaning of "grievance," that section continues with the following language, "Such matters shall be processed through the grievance procedure . . .," and if we stop here, we have no problem. Since the definition of a grievance is very broad and encompasses a breach of an express provision of the contract, which would include a breach of the provision against a lock-out, such grievance would be arbitrable. But, the language goes on to say, "without resort to a strike or a lock-out." If you read that complete clause in the light of the circumstances of this case, it says, in effect, a lock-out shall be processed through grievance procedure without resort to a lock-out. The same situation would exist if a strike were involved. It would simplify matters if the language "without resort to a strike or a lock-out" could be done away with completely. Nevertheless, such construction would be too drastic. That language must have been included for some reasonable purpose. In most instances, it would prevent strikes and lock-outs during arbitration and eliminate a situation such as was before the Court in *Drake Bakeries, Incorporated v. Local No. 50, American Bakery & Confectionery Workers International, AFL-CIO, et al.,* 370 U.S. 254. Even though in this suit it constitutes a stumbling block, we've go to deal with it.

So, we are back to the point where it must be decided if the term "lock-out" is or is not included in "such mat-

ters," under the complete text of Section 1 of Article V. Obviously, the language which we have dissected was not intended to convey the idea that the grievance procedures were to be used in event of a lock-out. To this Court, it strongly indicates a lock-out is not intended to be an arbitrable dispute. However, there is no phrase or clause which specifically spells out that a lock-out is excluded from arbitration. The test that "Language excluding certain disputes from arbitration must be clear and unambiguous, or *unmistakably clear,*" 48 Am.Jr.2d 783, Labor and Labor Relations, Section 1256 (emphasis ours), is not met here. The "lock-out" grievance is, therefore, arbitrable.

This Agreement also provides that certain actions on the part of the union can invalidate the grievance procedures. Continuing on with Section 1 of Article V, it further reads:

> ". . . and if either party hereto resorts to *any action* violative of Article IV (no strike, slow-down, work stoppage) of this agreement, the grievance and arbitration provisions of this article shall be null and void and of no effect, and either party hereto shall have the immediate right to seek redress from the appropriate court without the necessity of exhausting the grievance and/or arbitration procedures hereunder." (Emphasis ours.)

Do the words "any action" mean that we must consider the broader obligations of the union, as detailed in Article IV, and particularly Section 2, or does the parenthetical language limit the violations; and, in any case, must we consider the obligation of the company set forth in Article IV, Section 1, "that it will not lock out the employees covered by this agreement."

So, what action in violation of Article IV would void the grievance and arbitration provisions? If Section 1 of

Article V referred to all of Article IV, then any "lock-out" would have been such action. However, the only violations of Article IV which the Court opines would nullify the grievance and arbitration procedures would be some action by the union (strike, a slow-down, or work stoppage) and nothing more.

By way of a concluding summary, the provisions of the October 2, 1969, Collective Bargaining Agreement does authorize the submission to arbitration by the Meat Cutters Union of a lock-out. And, no actions have been taken which would nullify the grievance procedures. We add that, if during this controversy other grievance procedures are commenced, the union should continue or begin a strike, slow-down, or work stoppage, the grievance procedures are nullified and of no effect, and the employer may immediately seek redress in the courts.

Therefore, the motion for summary judgment filed herein by Defendants and Cross-Plaintiffs, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its Local No. 171, is granted; and, the motion of Plaintiffs Sam Kane Packing Co., Sam Kane Wholesale Meat, Inc., and Sam Kane Meat, Inc., is denied. It is declared there was an arbitrable issue submitted by said union for arbitration. It is ordered that Plaintiffs shall comply with the award of the arbitrator, Mr. Joe J. Bernal, dated September 21, 1971. Defendants and Cross-Plaintiffs, not being free from fault and having some responsibility for this litigation, will recover nothing by way of damages or attorney's fees from Cross-Defendants. This is a final judgment and Defendants shall have their costs.

Signed this 18th day of May, 1972.

OWEN S. COX
United States District Judge

APPENDIX D

ARBITRATOR'S DECISION AND AWARD
Award

[September 21, 1971]

Appearances:

Frank Herrera, Jr., Attorney, Herrera, Rocha & Segura, Inc., 712 San Antonio Savings Bldg., San Antonio, Texas, and Erbey M. Rendon, Financial Secretary, 502 Cupples Road, San Antonio, Texas, for the Union.

There were no appearances by anyone representing the Company.

Pursuant to the contract between Sam Kane Packing Company, Sam Kane Wholesale Meat, and Sam Kane Meat, Inc., hereinafter called the Company and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local No. 171, hereinafter called the Union, and specifically Article V entitled Grievance and Arbitration, the undersigned conducted a hearing at the Sheraton Marina Hotel in Corpus Christi, Texas, on August 23, 1971, and on September 1, 1971.

Chronology of Correspondence:

Chronology July 16 to August 30, 1971.

July 16—Letter: Alberts [employer's representative] to Rendon [union's representative]:

> "... D. C. Gutierrez ... advised that unless he was paid more money he wasn't going to work very hard." "... there was intensive harrassment of supervisors by employees ...". "... employees are hoping by slowdown, harrassment, absenteeism, and damaging equip-

ment to compel management to give them a salary increase."

". . . a final decision as to closing of the kill floor will need to be made within the next few days."

July 20—Letter: Alberts to Rendon:

". . . we are seriously contemplating the closing of the kill floor within the next few days . . ."

"At the end of the break period at 9:45 this morning, a substantial number of men failed to return to work, and it was finally necessary at about 11:15 to advise the men that they must either return to work or leave the plant premises. *Some* of the men refused to do either, and we finally had to have the Pinkerton guard and the police advise the men who were refusing to return to work to leave the plant premises, which they then did."

"We have still not made a final decision . . .".

July 21, 1971—Letter: Rendon to Alberts:

"I have learned that Sam Kane . . . Inc., has lockout its employees. This is contrary to the terms of our existing collective Bargaining Agreement."

"This Local Union is demanding that all employees be immediately reinstated to their job and compensated for any lost time."

July 21, 1971—Letter: Alberts to Rendon:

". . . a number of employees walked out and quit their jobs . . ."

". . . employees are now making a concerted effort to . . . threaten and coerce the other employees . . .".

"We shall . . . hold the Union liable in damages."

July 22, 1971—Letter: Alberts to Rendon:

"I am quite shocked that I have still received no word from you."

"Their violence is directed against Union employees even more so, we find, than against non-Union employees, and your interest should be as great or greater than ours in putting a prompt halt to this."

July 22, 1971—Letter: Alberts to Franklin Garcia, International Representative for Amalgamated Meat Cutters & Butchers Workmen of North America, AFL-CIO:

"Enclosed are my most recent three letters to . . . Rendon."

July 23, 1971—Letter: Alberts to Rendon:

". . . I received your . . . letter . . . saying that you had learned of a 'lockout'. This is entirely untrue . . .".

". . . some employees remained off from work . . . from 9:45 a.m. Tuesday . . . 'til well after 11:00 a.m.".

". . . approximately 45 to 47 refused to return to work and left the plant premises."

"Their walkout . . .".

"Our company has never engaged in a lockout . . .".

"The least that I had hoped from you was cooperation in this matter. Your failure to take action . . . speaks more eloquently concerning the attitude of your Union than anything else you could ever say or do."

July 27, 1971—Letter: Alberts to Rendon:

". . . I am furnishing to you herewith a list of all employees . . . as of July 20, 1971".

"I deeply regret . . . that you took the position that you knew of no violence . . .".

July 31, 1971—Letter: Rendon to Alberts:

". . . Contract provides in Article IV . . . it will not lock out the employees . . .".

"This constitutes formal invocation of the Grievance and Arbitration Procedures".

". . . We are instructing all your employees to report to work . . . on . . . August 4, 1971 . . .".

August 2, 1971—Letter: Alberts to Rendon:

"Your letter . . . arbitration procedures . . . is tardily written and tardily received under the express provisions of the Contract".

". . . your instructions to our former employees, is rather ill-advised and should be rescinded by you".

August 5, 1971—Letter: Patrick E. Gorman, International Secretary-Treasurer to Sam Kane, President of Company:

". . . our Vice President Twedell would be willing to meet with you . . .".

August 6, 1971—Letter: Frank Herrera, Jr., attorney for Union to Senator Joe J. Bernal:

". . . Local No. 171, has appointed you to act as an Arbitrator . . .".

Copy to Alberts.

August 6, 1971—Letter: Frank Herrera, Jr., to Alberts:

"Pursuant to Article V . . . the Union hereby appoints Senator Joe J. Bernal to serve as an Arbitrator to resolve the above referenced matter. I trust that the company will likewise appoint an Arbitrator in accordance with the provision of Article V."

"The issues . . ."

"1. Whether the company on July 20, 1971, locked out its employees in contravention of the provisions of Article IV."

"2. If so, whether the proper remedy is reinstatement of said employees to their former or substantially equivalent jobs with back wages."

August 9, 1971—Letter: Alberts to Herrera:

"I have today received your letter . . . I have somewhat mystified and flabbergasted by it."

". . . there is no arbitration . . .".

"1. Section 1 of Article V defines 'grievance' as a *written* dispute. You have neglected this."

"2. Section 1 further says: 'Such matters shall be processed through grievance procedure without resort to strike or walkout' . . . Your members walked out . . .".

"3. . . . your Union violated Article IV repeatedly."

"4. . . . that the employee having a complaint shall observe a specific procedure . . . within three days. This was not done."

"5. Step 2 was also skipped."

"6. A step 3 is required to be performed within five calendar days . . . furnish a copy . . . to the plant superintendent . . . not done."

"8. . . . 'all grievances not presented . . . within five (5) calendar days . . . shall be deemed waived by the complaining employee and by the Union.' "

"If and when any matter for arbitration is properly brought the company appoints the undersigned as its arbitrator . . . Alberts."

August 9, 1971—Letter: Alberts to Gorman:

"I was disturbed at the vagueness of the first paragraph in which you refer to merely a 'situation presently prevailing.' "

"will be happy . . . for Mr. Twedell to meet with me at any mutually convenient time."

"it would be some indication of sincerity if the Union were to seek to terminate the intimidation . . ."

August 13, 1971—Letter: Gorman to Alberts:

"The reputation of our International Union has always been one attached to the most tranquil word in the English language—conciliation, which usually leads to the alter of compromise."

". . . our Vice President Twedell . . . I will have him get in touch with you . . .".

August 18, 1971—Letter: Bernal to Alberts:

"As you know, I have been selected . . . arbitrator . . .".

". . . You and I pursuant to the terms of the Collective Bargaining Contract must select a third neutral arbitrator. In the event you choose not to, then I, in accordance with . . . Contract, will act . . . After close of the hearing, I will then issue an award based on the evidence."

". . . be advised . . . hearing to commence, Monday, August 23, 1971, 9:30 a.m. at the Sheraton Marina, 300 North Shoreline, Corpus Christi, Texas, Room 1009."

August 20, 1971—Letter: Alberts to Bernal:

". . . you have been blatantly misinformed . . . you are not an arbitrator . . . there is no matter being

arbitrated . . . you have been misused and misinformed . . . your ill-starred 'appointment' is a fiction of Mr. Herrera's imagination."

August 27, 1971—Alberts to Rendon:

"The unilateral effort of your appointee . . . Bernal . . . is in our view a total nullity."

August 30, 1971—Letter: Alberts to Herrera:

"company has appointed . . . Alberts . . . to arbitrate . . .".

"We have no intention of recognizing anything that Senator Bernal does . . .".

Statement of Grievance:

Refer to Chronology: July 21, 1971 letter—Rendon [union's representative] wrote to Alberts [employer's representative]: company has locked out employees. Response by Alberts on July 21, 1971: employees have walked out. On July 31, Rendon states that because of lockout he is constituting formal invocation of the Grievance and Arbitration Procedures. Response by Alberts August 2, 1971: Arbitration invoking of procedures are tardily written and tardily received.

Statement of Issues:

1. Whether the company on July 20, 1971, locked out its employees in contravention of the provisions of Article IV.

2. If so, whether the proper remedy is reinstatement of said employees to their former or substantially equivalent jobs with back wages.

Union's Position:

The Union affirms in letter Rendon to Alberts dated July 21, 1971, that the company has locked out its employees and that this was contrary to the terms of the contract. The Union thereupon demanded that all employees be immediately reinstated to their jobs and compensated. On July 26, 1971, Rendon met with Alberts in an effort to resolve the dispute but Alberts stated that there was nothing to resolve. On July 31, the Union asked that the matter be promptly presented to Arbitration and it instructs all its employees that in the meanwhile they all are to report for work on August 4, 1971. The company refused to let the employees in. On August 6, 1971, the Union asked for arbitration and laid out the issues, appointing the undersigned as its arbitrator. The Union maintaining that it was following arbitration procedures proceeded to name Senator Joe J. Bernal as Arbitrator to resolve the differences held by the Union and the Company. (Refer to Chronology—August 6—Letter: Herrera to Alberts). The Union further requested that the Company appoint an Arbitrator in accordance with Article V of Contract. The Company responded through Mr. Alberts that . . . "there is no arbitration whatsoever pending nor any matter currently eligible for arbitration between our client and yours."

The Union then proceeded to carry out its arbitration. Bernal wrote to Alberts that pursuant to the contract he and Alberts must select a third neutral arbitrator and that in the event this was not done Bernal would then issue an award based on the evidence. Bernal at this time advised Alberts of the date, time and place where the hearing would commence. (Chronology—August 18, Bernal to Alberts). Alberts responded to Bernal that "there is no matter being arbitrated" and that "your ill-starred 'appointment' is a fiction of Mr. Herrera's imagination". (Chronology August 20, Alberts to Bernal).

On August 23, and in accord with prior notice given Alberts and pursuant to contract guidelines the Union through Herrera and Rendon called their witnesses before Bernal, the sole Arbitrator. Bernal opened the meeting by disagreeing with Alberts' prior statement that there was no matter being arbitrated.

Bernal proceeded to hear the testimony of the witnesses beginning with Rendon's testimony in which he is financial secretary of the Union explained the Union's position. Alberts called Rendon long distance to San Antonio from Corpus Christi on July 16, 1971, that he had problems on the kill floor—problem consisting of: absenteeism, insufficient production, and insubordination. Rendon told Alberts he would have to investigate the situation and talk to Joe Camarillo who is the Union's Chief Steward on the kill floor. He did. Camarillo denied the allegations and asked for specifics.

Rendon called Alberts on July 19, and requested specifics on the allegations. Alberts accused D. C. Gutierrez of saying that he would produce more if paid more. (Also stated in Chronology—July 16, letter: Alberts to Rendon). Alberts also stated that he would shut down the kill floor. Rendon asked that he be allowed to be present with the people if a meeting was called. Rendon further testified that he had spoken to Camarillo by phone and that Camarillo had stated that between 43 to 45 kill floor personnel had been ejected by policemen and that employees had been locked out. Rendon wrote a letter on July 21 to Alberts that the lockout was contrary to Article IV of Contract.

Witness No. 2, Noe F. Barrera, arrived at work at 7:30 a.m. He was told by his fellow employees of a meeting held in the Hide Room. Barrera testified that there were about 40 employees there and that also present were Sam Kane, Lieberman, Jerry Kane, J. White, and Harold Al-

berts. According to Barrera, Alberts began the meeting on July 20, about 7:45 a.m. saying that he would not talk with interruptions. Alberts, Barrera continued, proceeded to write on a blackboard 5 to 8 things he did not like on the kill floor—things like going to the bathroom too much, not doing job fast enough, and that the chain was being deliberately stopped to put more hours in. The meeting broke up at 9:30 in time to have employees go to coffee break (in accord with Contract).

After the break Barrera states that Alberts told the employees they had 2 minutes in which to discuss the meeting events. Mr. Cass Stevens came in to tell us to leave because the police would come to get us out. Barrera states that the police arrived within 5 minutes. There were 4 or 5 policemen. The police told the people to leave and they left. There was no violence and the people left peacefully, stated Barrera.

Witness No. 3, Jose Luis, Jr., testified that he had been on vacation and reported to work on July 26. He was told by the security guard that he could not come in. He stated he has not worked since; that he was not violent at anytime; and that he had not notice any violence at any time by any of the Union members.

Witness No. 4, Jose Luis Morales, testified that a meeting of employees had been called by the company at 7:45 a.m. on July 20th. He said that after the break in the ensuing two minutes he had another employee explain to him what was going on (he speaks little or no English) and that the police arrived about 3 minutes later. He stated he had not committed any violence.

Witness No. 5, Mario Auiles (who testified he could not speak English) stated in Spanish that he had been present at the meeting on July 20 where Alberts spoke. He stated that his "companeros" (companions) had told him he had 2 minutes to come in to work. Also, he said that the police,

about 3 of them, had arrived in about 3 minutes and that he had gone out peacefully. He stated he had not worked since.

Witness No. 6, Joaquin Garcia, who also spoke no English testified that he had not committed violence and had not seen anyone else commit any violence. The other workers explained to him what Alberts had said at the meeting.

Witness No. 7, Juanita Barrera, testified that the police had escorted the workers out.

Witness No. 8, Petra H. Lopez testified until Bernal was served notice by a Temporary Restraining Order at 11:20 a.m.

The hearing was immediately stopped by the undersigned.

On August 30, 1971, Bernal notified Alberts that in view of the Court decision that it was without jurisdiction to grant injunctive relief, the hearing would resume September 1, Room 1009, Sheraton Marina Hotel, 9:30 a.m., Corpus Christi, Texas.

The rest of the witnesses which numbered exactly 44 in all generally testified that:

(1) They had been at the meeting on July 20, 1971.

(2) Alberts had done the talking.

(3) They had taken their coffee break.

(4) They had come back for a short time after break.

(5) They had been told by the police to leave the plant.

(6) They had left the plant peacefully.

(7) They have not worked since the lockout occurred (with few exceptions).

(8) They want to go back to work for the company (every witness asked this question answered in the affirmative).

Company's Position:

The Company's position has been stated by Alberts beginning with the first phone call he made to Rendon on July 16, 1971, wherein Alberts stated that there were problems employees were creating—namely absenteeism, slowdown, and harassment of supervisors by employees.

As it regarded the Union's position that the Employees on the Kill Floor were locked out (Chronology July 23, 1971, Alberts to Rendon) Alberts maintained that approximately 45 to 47 refused to return to work and left the plant premises. He also states to Rendon that he deeply regrets that Rendon has taken the position that he knows of no violence.

As it regards the involving of arbitration procedures Alberts maintains throughout a series of letters to Rendon, Herrera, and Bernal that there is no arbitration; (Chronology, August 9—Alberts to Herrera). The company further holds that Article V defines a grievance as a written dispute and that the Union has neglected this. And that if employees have a complaint they shall observe a specific procedure within three days. This, according to Article IV, was not done, so holds the company. The grievance, the company maintains, shall be dated and signed by the aggrieved employee and within five days a copy furnished to the plant superintendent—this was not done. Lastly, the company holds that if the grievances are not prosecuted accordingly within five calendar days the grievance shall be deemed waived by the complaining employee and by the Union. (Chronology August 9, 1971, Alberts to Herrera).

Contract

Article I—Recognition

Section 1. The Company recognizes the Union as the collective bargaining representative for all . . . employees . . .

Section 3. The Company will not use its managing rights for the purpose of discriminating against any employees because of Union membership . . .

Article IV—No Strike, Slow-Down, Work Stoppage

Section 1. . . . Company agrees that it will not lockout employees . . .

Section 2. . . . Union . . . will not sanction . . . slowdown . . . or other work stoppage against the company for any reason. . . . Any employee covered by the terms of this agreement . . . may be disciplined by the company either by discharge or lesser penalty.

Section 3. In the event of any work stoppage . . . the Union shall immediately instruct the involved employees in writing that this conduct is in violation of the contract . . .

Section 5. The Company shall have the right to discipline . . . any employee who . . . participates in . . . any activity prohibited by this Article. . . .

Article V.

Section 1. For the purpose of this agreement the term grievance means a written dispute, claim or complaint . . . such matters shall be processed through the grievance procedure without resort to a strike or a lockout . . .

Section 2. The Company agrees to meet with the . . . Union . . . for the purpose of handling . . . grievances.

Section 4. Procedures

Step 1. . . . First discuss the grievance with his or their immediate supervisors . . .

Step 2. If . . . no . . . satisfaction . . . the Union may review the complaint with the employee's immediate supervisor.

Step 3. The aggrieved employee may, within five calendar days . . . declare the complaint to be a grievance by reducing same to writing, . . . The grievance shall be dated and signed by the aggrieved employee . . . shall furnish a copy of the grievances . . . to the plant supervisor or to the plant manager. All grievances not presented . . . within five calendar days . . . grievances arose shall be deemed waived by the complaining employee and by the Union.

Step 4. If the grievance is not satisfactorily adjusted by the company . . . arbitration may be invoked . . .

Section 8. Either party may request arbitration of an unsettled grievance after exhaustion of the grievance procedure . . . limited to a period of ten calendar days . . .

One representative shall be appointed by the company, and one (1) representative . . . by the Union . . . made by the parties within one (1) week after the written request by either party to submit the grievance to arbitration.

If either the company or the Union fails to appoint their respective arbitrator within said one (1) week period, then the arbitrator so appointed by the other party shall promptly arbitrate and settle such grievance or grievances, and his decision or decisions shall be final and binding upon the parties.

. . . The party or parties desiring arbitration shall promptly within two (2) calendar days present in writing

to the arbitrators so appointed as above provided, then the two (2) arbitrators shall select the third (3rd) arbitrator . . .

Section 10. . . . The grievance and arbitration procedures here established are intended to resolve disputes . . . specifically covered in this contract . . .

Section 12. Powers of Arbitration . . . cannot modify . . . terms of this agreement.

Section 15. Arbitration Rules. It shall be the obligation of the arbitrators . . . to make their best effort to rule on cases heard by them within twenty-one (21) days after the hearing.

When arbitration is entered into, there shall be no appeal from the arbitrators' decision.

Decision

The Company complained on July 16, 1971, that one D. C. Guiterrez had made the remark that unless he was paid more money he wasn't going to work. Rendon said he would look into the matter and did get in touch with Joe Camarillo, the Union's chief steward on the kill floor. The complaint was reasonably being looked into. Within four days, however, according to the best available date and testimony, the Company, with seeming premeditation, did in fact lock out its employees.

It seems to the arbitrator that on the basis of one man's remark (Gutierrez's) the Company proceeded to lockout over 40 employees—without giving an opportunity to the Union to act according to the contract.

The Union (According to Article V, Section 8) was correct in asking that the employees go back to work so that the matter could be promptly arbitrated. From all the evidence presented, the Union followed the grievance procedure in effort to resolve the July 20th incident.

The testimony presented by the 44 witnesses was clear and precise—the Company did call a meeting of the employees on July 20, 1971 at approximately 7:45 a.m. and within five (5) minutes after the 9:30 coffee break that same morning the employees were escorted out of the Company by the company's security guards and two (2) city policemen.

As to the validation of having a sole arbitrator render this judgment: the Union gave the Company every opportunity to participate by notifying Alberts by mail each time the hearing was to be held. Because Alberts would not recognize the invoking of arbitration does not in fact negate arbitration. That Alberts states that if and when any matter for arbitration is properly brought forth, the Company appoints Alberts, and then not recognize an arbitration request is to be completely and biasly capricious. The Company as well as the employees have been hurt by Alberts' course and high-handed unilateral actions of July 20th when he told the employees he was not to be interrupted while he was speaking and then having them locked out of their jobs. Section 8 of Article V states that if either the Company or Union fails to appoint their respective arbitrator within one (1) week the arbitrator so appointed by the other party shall promptly arbitrate and his decisions will be final. That Alberts did not appear when invited to the two hearings is indicative of his lack of sincerity and concern for the employees on the kill floor—and that he was not willing, in fact, to be an arbitrator.

There was no information available to the arbitrator which would indicate that there was any slow down, harassment, absenteeism, or any damaging of equipment other than that statement made by Alberts to Rendon on July 16th that the Company has a right to discipline employees to the extent of discharging them or relieving them of their employment for violation of Company rules. There

is no record, according to our extensive chronology of correspondence between the Company and Union officials, which would indicate that any one specific person was being charged with any slowdown, harassment, absenteeism, or what is obviously a criminal act, that of damaging equipment.

The arbitrator finds that on July 20th, the employees were locked out, in contravention of the provisions of Article IV. The arbitrator further finds that none of the named employees quit their job or performed any act or acts that would authorize the Company to terminate the employment of such employees. Also, it is found that none of the named employees refused the Company's offer to return to work or refused to respond to the Company's offer to return to work.

Award:

The Company is hereby Ordered to offer the following named employees immediate and full reinstatement to their former or substantially equivalent positions without loss of any rights and privileges. Furthermore, the Company is Ordered to pay all lost wages to the following named employees commencing on July 20, 1971:

(a) Noe F. Barrera—has not worked since July 20, 1971

(b) Jose Luis, Jr.—has not worked since July 26, 1971, which was when his vacation ended and when he attempted to return to work but was not allowed to do so by the security guard.

(c) Jose Luis Morales—has not worked since July 20, 1971

(d) Mario Aviles—has not worked since July 20, 1971

(e) Joaquin Garcia—has not worked since July 20, 1971

(f) Juanita Barrera—has not worked since July 20, 1971

(g) Petra H. Lopez—has not worked since July 20, 1971

(h) Teresa Soto—has not worked since July 20, 1971

(i) Nick Martinez—has not worked anywhere since July 20, 1971

(j) Cesario Garza—has not worked anywhere since July 20, 1971

(k) Ramiro Buento—has not worked anywhere since July 20, 1971

(l) Augustin Garcia—has not worked since July 20, 1971

(m) Ray V. Deramus—has not worked since July 20, 1971

(n) Hipolito Caranza—has earned only $56.00 while working elsewhere since July 20, 1971

(o) Rene Ruiz—has not worked anywhere since July 20, 1971

(p) Joe M. Camarillo—has earned only $96.00 while working elsewhere since July 20, 1971

(q) Jose Trevino—has earned only $165.00 while working elsewhere since July 20, 1971

(r) Mary Escobedo—has not worked anywhere since July 20, 1971

(s) Pete Sufuentes—has earned only $22.10 while working elsewhere since July 20, 1971

(t) Ernest Martinez—has not worked anywhere since July 20, 1971

(u) Enrique Garcia—has not worked anywhere since July 20, 1971

(v) Luis Urtado—has earned only $68.00 while working elsewhere since July 20, 1971

(w) Antonio Lopez—has earned only $105.00 while working elsewhere since July 20, 1971

(x) Enrique Sauceda—has earned only $16.00 while working elsewhere since July 20, 1971

(y) Julia Zamora—has not worked anywhere since July 20, 1971

(z) Roberto Lopez—has not worked anywhere since July 20, 1971

(aa) Olga Vega—has not worked anywhere since July 20, 1971

(bb) Delia Nunez—has not worked anywhere since July 20, 1971

(cc) Estella Garcia-Nieto—has not worked since July 20, 1971

(dd) Enrique L. Urtado—has earned only $68.00 since working elsewhere since July 20, 1971

(ee) Rosa C. Nunez—has not worked anywhere since July 20, 1971

(ff) Hector Gallegos—has not worked anywhere since July 20, 1971

(gg) Roberto Trevino—has earned only $55.00 while working elsewhere since July 20, 1971

(hh) Francisco Ramon—has not worked anywhere since July 20, 1971

(ii) Tilman Walker—has not worked anywhere since July 20, 1971

(jj) Lupe Marroquin—has earned only $24.00 while working elsewhere since July 20, 1971

(kk) Jose Gonzalez—has not worked anywhere since July 20, 1971

(ll) Martin Zapata—has earned only $22.00 while working elsewhere since July 20, 1971.

(mm) Elva Sandoval—has not worked anywhere since July 20, 1971

(nn) Roberto Rios—has not worked anywhere since July 20, 1971

(oo) Carmen Garcia—has not worked anywhere since July 20, 1971

(pp) Petra R. Pena—has earned only $100.00 while working elsewhere since July 20, 1971

The Company shall pay all lost wages to all of the above named employees since July 20, 1971, based on a forty hour week at the hourly rate that they were earning as of July 20, 1971, less any amount earned in the interim period as reflected above. The offer reinstatement with lost wages shall be made in writing not more than five days after receipt of this order, the Company shall also serve copies of the written offers being served on the Union and its attorney, Frank Herrera, Jr.

Dated: September 21, 1971

San Antonio, Texas

Senator Joe J. Bernal
Arbitrator

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No. 73-264

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND ITS LOCAL NO. 171,
Petitioners,

v.

SAM KANE PACKING CO., SAM KANE WHOLESALE MEAT, INC., AND SAM KANE MEAT, INC.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

L G. CLINTON, JR.
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FIDELITY PRINTING COMPANY, INC., HOUSTON

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is officially reported at 477 F.2d 1128.

The opinion of the United States District Court for the Southern District of Texas is not yet officially reported and is attached to the Petition for a Writ of Certiorari as Appendix "C".

QUESTION PRESENTED

Whether or not, under the facts and circumstances of the case, the Union is entitled to enforcement of a unilateral, ex parte arbitration award under Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185.

STATEMENT OF THE CASE

Respondents would respectfully refer this Honorable Court to the opinion of the United States Court of Appeals for the Fifth Circuit (477 F.2d 1128, Appendix "B" to the Petition for a Writ of Certiorari) for a more accurate and full statement of the facts of the case, especially footnote 1, 477 F.2d 1128, 1130 n. 1 and the Court's Opinion at 477 F.2d 1128, 1131-32, which set forth the pertinent contractual provisions.

Respondents (hereinafter referred to as the "Company") believe that some additional amplification as to the nature of the case is necessary. First, the Petitioners' (hereinafter called "Union") consistent position after the dispute arose was that the Company had engaged in a "lockout" of the employees, and the Company's position was that it had not locked out the employees but that the employees had engaged in an improper work stoppage and engaged in acts of violence and intimidation.[1] The Union sought to invoke the grievance and arbitration provisions of the contract over the Company's alleged lockout, and the Company denied that a lockout was an arbitrable matter under the parties' collective bargaining agreement.[2] The Company, while denying that the alleged lockout was an arbitrable matter under the contract, clearly advised the Union, *before* it undertook its unilateral, ex parte proceeding, that in the event the matter was found to be arbitrable the Company appointed its Secretary and General Counsel, Harold Alberts, as the Company's Arbitrator[3] (477 F.2d 1128, 1131.).

Thus, the Union was contending that the Company had locked out the employees and was seeking to arbitrate the

[1] Joint Appendix, Court of Appeals, 88-92, 108-109, 110-111.
[2] Joint Appendix, Court of Appeals, 100-101, 104-105, 108-109, 110-111.
[3] Joint Appendix, Court of Appeals, 112-114, 121, 122.

alleged lockout, and the Company was contending it had not locked out the employees and that the issue of lockout was not an arbitrable matter under the parties' collective bargaining agreement.[4] Despite the controversy over the arbitrability of the matter, the Union designated its Arbitrator, and the Company designated its Arbitrator in the event there was an arbitrable matter to be heard. When the Union announced its intention to proceed unilaterally, the Company filed suit in the United States District Court for the Southern District of Texas, Corpus Christi Division, seeking to enjoin the unilateral, ex parte hearing and secured a temporary restraining order from the District Court.[5] The Company also sought a declaratory judgment from the District Court as to whether or not the matter was arbitrable under the parties' agreement.[6] After hearing, the District Court dissolved the temporary restraining order, but did not pass upon the Company's request for a declaratory judgment as to arbitrability, and the Union again announced its intentions to proceed unilaterally; the Company reiterated that Alberts was the Company's Arbitrator in the event the matter was arbitrable and that the question of arbitrability was pending before the District Court.[7] After the Union's appointed Arbitrator had issued his ex parte, unilateral award, the Union filed a supplemental petition and counterclaim seeking to enforce the unilateral award, and the Company answered denying the validity of the award and contesting the propriety of the arbitration proceeding.[8]

---

[4] Both lockouts and strikes and work stoppages were expressly excluded from arbitration under the exclusionary clause of Article V, Section 1, of the parties' collective bargaining agreement quoted in the Opinion of the Court of Appeals at 477 F.2d 1128, 1131.

[5] Joint Appendix, Court of Appeals, 2, 4-6.

[6] *Id.* at 7-10.

[7] *Id.* at 127-131, 156-157, 161.

[8] *Id.* at 21-27.

As found by the Court of Appeals in its Opinion, it is clear that the Company informed the Union prior to the Union's undertaking of its unilateral arbitration proceeding, that it did not believe the matter arbitrable and if it was arbitrable then the Company's Arbitrator was Alberts. "Both the union attorney, Mr. Herrera, and the union representative, Senator Bernal, were clearly informed of this position in advance of the scheduled hearing date" (477 F.2d at 1131.). The District Court had construed the contract provisions in such a way as to exclude lockouts from the exclusionary language of Article V, but, as found by the Fifth Circuit, neither the Union nor the Company agreed with this construction of the contract, and the Union does not attack this portion of the Opinion of the Fifth Circuit in its Petition for a Writ of Certiorari (477 F.2d at 1132.). The Court of Appeals in finding the underlying dispute between the parties arbitrable disregarded the Union's characterization of the dispute as a lockout and determined that the real issue which the Union sought to arbitrate was whether or not the Company had any justification in replacing and discharging the employees who ceased work (477 F.2d at 1132-33.). Having thus decided the question of arbitrability, the Court of Appeals then discussed the effect of the unilateral award of the Union's Arbitrator against this background. As the Court of Appeals noted, each party had appointed their Arbitrators, and the two party-appointed Arbitrators were in basic disagreement over the threshold issue of arbitrability (477 F.2d at 1135.). Having concluded that the Company had appointed its Arbitrator, the Court found that the narrow exception contained in the parties' contract allowing unilateral proceedings was no longer applicable and that the Union should have sought an Order from the District Court

compelling the Company to arbitrate,[9] and the Company should have sought a prohibition of the one-sided arbitration as well as seeking a determination of the arbitrable nature of the dispute.[10]

The assertions advanced by the Union in its Petition for a Writ of Certiorari (pp. 6-8) in attacking the Opinion of the Court below were not raised in the Court below. There is no evidence whatsoever in the Record to support the Union's concept of the contractual provisions as advanced in its Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

UNDER THE UNIFORM DECISIONS OF THIS COURT THE QUESTION OF ARBITRABILITY IS FOR THE COURTS.

In this case, the parties were in dispute as to whether or not the matter was arbitrable and it was the Company who sought by declaratory judgment action to have the appropriate forum, the Court, determine the question of arbitrability before undertaking to arbitrate. This was clearly its right under the decisions of this Court. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241-242 (1962); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964). *Accord: Mogge* v. *District No. 8, IAM*, 387 F.2d 880, 882

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[9] The Court also suggested that the Union should have, in accordance with the contract procedures, requested a panel of neutral arbitrators from Federal Mediation & Conciliation, 477 F.2d at 1136 n. 3.

[10] 477 F.2d at 1136 n. 5. The Company would point out that this is exactly what it had sought to do in seeking to restrain the ex parte, unilateral proceeding by the Union's Arbitrator pending a determination of the issue of arbitrability under its Amended Complaint (Joint Appendix, Court of Appeals, 4-5, 7-10).

(7th Cir. 1968), *cert denied,* 391 U.S. 936. As stated by this Court in *Wiley,* 376 U.S. at 547:

> "'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. . . . The duty to arbitrate being of contractual origin, *a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.*" (Emphasis added.)

II.

THE COMPANY COMPLIED WITH THE CONTRACTUAL OBLIGATIONS.

Upon the Union's invocation of the grievance and arbitration provisions of the parties' contract, the Company contested arbitrability. Nevertheless, when the Union designated its Arbitrator, the Company complied with the contractual provisions and designated its Arbitrator as well. Both Arbitrators having been designated, the Company consistently advised the Union and its Arbitrator, prior to the commencement by the Union of its unilateral, ex parte proceeding, that the Company had appointed its Arbitrator and did not believe the matter was arbitrable. The Union further knew prior to instituting its unilateral, ex parte proceeding that the Company was seeking to have the appropriate forum, the Court, determine the question of arbitrability. Rather than follow the common practice, as suggested by the Fifth Circuit in its Opinion, of seeking to have the Court compel the Company to arbitrate, or, as the Fifth Circuit also suggested, sending off for a panel of neutral arbitrators from Federal Mediation & Conciliation Service as the contract specified, the Union undertook to proceed unilaterally. The Company's action here not only

complied with the parties' collective bargaining agreement but was also consistent with the decisions of other Courts of Appeal in similar situations. *Mogge* v. *District No. 8, IAM*, 387 F.2d 880, 882 (7th Cir. 1968), *cert. denied*, 391 U.S. 936; and *Food Handlers Local 425* v. *Pluss Poultry, Inc.*, 260 F.2d 835 (8th Cir. 1958) (denying enforcement of an arbitration award entered by an arbitrator designated unilaterally by the union where the company refused to appoint an arbitrator, contending the matter was not arbitrable).

CONCLUSION

It is clear under the facts of this case that the Company contested the arbitrability of the dispute which the Union characterized as a lockout and sought to submit to arbitration. The Company sought to obtain a judicial determination of arbitrability before agreeing to arbitrate, but, nevertheless, the Company, in accordance with contractual procedures, appointed its Arbitrator in the event the matter was determined to be arbitrable. The Union, ignoring the contractual provisions requiring the request of a panel of arbitrators from the Federal Mediation & Conciliation Service in the event the two appointed Arbitrators could not agree on a third arbitrator, and failing to seek to compel the Company to arbitrate in the District Court, undertook without any authority in the agreement or in the decisions of the courts to proceed unilaterally. Under these circumstances, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

By .....

L. G. Clinton, Jr.
A. J. Harper II
Harold Alberts

CERTIFICATE OF SERVICE

I, A. J. Harper II, do hereby certify that on this 29th day of August, 1973, a true and correct copy of the foregoing Brief for Respondents in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served on the following by placing same in the United States mail, postage prepaid:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-264

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, and its LOCAL NO. 171,
Petitioners,

vs.

SAM KANE PACKING COMPANY, SAM KANE WHOLESALE MEAT, INC., and SAM KANE MEAT, INC.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Respondent's Brief in Opposition serves to emphasize the importance of the issues, and the necessity for their resolution by this Court if the national policy of settlement of labor disputes through contractual arbitration is to be effective.

1

Respondent's assertion (Oppn. p. 8) that "The company sought to obtain a judicial determination of arbitrability before agreeing to arbitrate . . ." unmasks its contrary assertion that it had appointed its arbitrator.

This assertion further demonstrates the fallacy in respondent's position. Actually, the agreement to arbitrate was made when the collective bargaining agreement was signed. Employer's

premise is that despite such agreement, there can be no arbitration of grievances which arise during the term of the agreement unless the parties **again** agree to arbitrate—or a court requires it. To require the parties to thus double back every time a grievance arises is the surest way to make arbitration inoperative. It was precisely to avoid this that the default procedure was adopted. It should be enforced.

2

Respondent asserts the "common practice . . . of seeking to have the Court compel the company to arbitrate" (Oppn. p. 6). This "common practice" is so devastatingly time consuming, and so emasculates the arbitral process, as to lead management and labor jointly by collective bargaining contracts to seek expedited procedures. The genius of our national labor policy is that:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d)

This case presents a method agreed upon by the parties to expedite adjustment and to avoid the "common practice" which delays adjustment and clogs court dockets.

3

Cases from this Court,[1] and the Courts of Appeals,[2] which hold only that questions of arbitrability are for the courts, are cited by respondents for the proposition (never before presented here) that court determination of arbitrability must **precede** arbitration.

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[1] **Atkinson v. Sinclair Refining**, 370 U.S. 238 (1962); **John Wiley & Sons v. Livingston**, 376 U.S. 543 (1964).

[2] **Mogge v. District No. 8, IAM**, 387 F.2d 880 (C.A. 7, 1968).

Far from requiring prior court determination, this Court in **United Steelworkers v. Warrior & Gulf,** 363 U.S. 574 at 583, Note 7, stated that the parties could vest in the arbitrator the power to decide arbitrability.[3] A fortiori, the parties can contract for prompt arbitration, to precede court determination. For as Professor Cox observes:[4] ". . . surely no collective agreement contemplates elaborate proof of its industrial context first in the suit to compel arbitration and later in arbitration."

Nor may respondent take comfort from the cases it cites. In **Wiley**[5] this Court decided "whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision," 376 U.S. at 547. Determination that courts, rather than arbitrators are to determine arbitrability does not determine which comes first. Parties are left free to bargain and contract for the sequence. Certainly **Wiley** does

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[3] This Court's note stated, 363 U.S. at 583, Note 7, emphasis added:

> "It is clear that under both the agreement in this case and that involved in American Mfg. Co., 4 L. Ed. 2d 1403, the question of arbitrability is for the courts to decide. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L.Rev. 1482, 1508-1509. Where the assertion by the claimant is that the parties **excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator,** the claimant must bear the burden of a clear demonstration of that purpose."

[4] Archibald Cox, Reflections Upon Labor Arbitration, 72 Harvard L.Rev. 1482, 1515 (1959).

Professor Cox further argues (Ibid. at 1518):

> "To require the union to go to trial on the facts twice would be both wasteful and expensive. The delay would impair the value of arbitration. These disadvantages outweigh the costs to the employer of the arbitration proceeding, the risk of an invalid award, and any pressure he may feel to comply with an award even though it goes beyond the arbitrator's power."

[5] 376 U.S. 543 (1964).

not preclude the parties from agreeing, as here, that arbitration shall be expedited, and proceed forthwith despite one party's default. Post-arbitration court review remains available.

Nor may respondent take comfort from **Mogge**[6]—which, like **Wiley**, merely held the question arbitral. The sequel to **Mogge** is ignored by Respondent. There, **three years later,** and when the employer was continuing its recalcitrance, the Seventh Circuit enforced the arbitrator's award, and observed, 454 F.2d 510 at 513 (C.A. 7, 1971):

> "The national labor policy of encouraging private arbitration of labor disputes, because of its potential for expeditious disposition of these matters without resort to the courts, has been thwarted in this protracted case."[7]

Wherefore, certiorari should be granted.

Respectfully submitted,

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[6] **Mogge v. Dist. No. 8, IAM,** 387 F.2d 880 (C.A. 7, 1968), at Respondent's Brief, pp. 5, 7.

[7] Nor is the Eighth Circuit's pre-trilogy, **Food Handlers v. Pluss Poultry,** 260 F.2d 835 (C.A. 8, 1958) (relied upon at Oppn. p. 7) supportive of respondent. The collective bargaining agreement there made no provision for default arbitration. Nevertheless the Court, in the course of an otherwise rather unclear statement of its rationale, held that under §4 of the United States Arbitration Act: "**mere assertion of non-arbitrability by one of the parties would not make it necessary for the other to petition for a Court order to proceed.** . . . Questions as to arbitrability of such disputes are **initially** for the arbitrators and if they reach a wrong conclusion in that regard it is subject to correction by a court," 260 F.2d 835 at 838, emphasis added.